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# THE FEDERAL ADVISORY COMMITTEE ACT AND ITS FAILURE TO WORK EFFECTIVELY IN THE ENVIRONMENTAL CONTEXT

*Laurie Aurelia\**

## I. INTRODUCTION

Cathy Sue and Roger Anunsen are trying to save the mountain goat in Olympic National Park in the Pacific Northwest.<sup>1</sup> The mountain goat is in jeopardy there because a recent draft of an environmental impact statement contends that the goats, as non-natives of the park, threaten native vegetation.<sup>2</sup> The impact statement, drafted by park environmentalists, categorizes the mountain goats as pests and recommends killing them.<sup>3</sup> In their campaign to save the mountain goat, the Anunsens, who consider themselves staunch environmentalists, have found themselves fighting the National Park Service, the Sierra Club, and Friends of the Earth, among others.<sup>4</sup> Their battle is progressing through two methods—a local public relations campaign to solicit support for their cause—and in courts, by attacking the procedure which has led to the possible mountain goat extermination.<sup>5</sup> In particular, the Anunsens say they plan to use the government's "own red tape" to stall institution of the extermination policy.<sup>6</sup> That red tape includes a suit under the Federal Advisory

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\* Editor-in-Chief, 1995–1996, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

<sup>1</sup> Rob Carson, *Guardians of the Goats*, THE NEWS TRIBUNE, June 4, 1995, at 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Carson, *supra* note 1, at 1.

Committee Act (FACA).<sup>7</sup> FACA requires that advisory committees like that which drafted the park's environmental impact statement conduct their procedures according to prescribed mandates.<sup>8</sup> The Anunsens plan to sue the government for failing to comply with FACA.<sup>9</sup> This case illustrates why FACA was originally passed—to ensure that before important governmental decisions are made, all voices relevant to that decision have a chance to be heard. If an advisory committee violates FACA and those voices are not heard, a FACA suit is a way for a concerned plaintiff to stall implementation of decisions based on advisory committee recommendations. Unfortunately, in many cases, and perhaps in the Anunsens' case, FACA is failing to work as Congress originally intended.

An enormous network of executive branch advisory committees, like that which the Anunsens may be battling, has developed within the federal government since the days of the New Deal.<sup>10</sup> At recent count, there are almost eleven hundred advisory committees to the executive branch, made up of almost thirty thousand members and costing about \$144 million each year.<sup>11</sup> Despite both presidential and congressional efforts to regulate these advisory committees, the committees remain ungoverned, allowing for substantial abuse.<sup>12</sup> The lack of adequate regulation of advisory committees stems in part from statutory construction and in part from current judicial application of advisory committee regulations.<sup>13</sup>

An advisory committee is established by either the President or an executive agency and is made up of a group of experts in a particular field.<sup>14</sup> An advisory committee is responsible for providing advice, assisting in the creation of legislation or regulations, and establishing policy.<sup>15</sup> The advice that advisory committees provide to executive agencies and to the President covers everything from the space program to flue-cured tobacco.<sup>16</sup> Executive branch advisory committees are particularly prevalent and influential in the environmental con-

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<sup>7</sup> Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 1-15 (1995).

<sup>8</sup> *Id.*

<sup>9</sup> Carson, *supra* note 1, at 1.

<sup>10</sup> Brad Brown, *\$144 Million Advice Network*, N.Y. TIMES, Jan. 13, 1995, at A23.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *infra* notes 220-36 and accompanying text.

<sup>14</sup> See Brown, *supra* note 10, at A23.

<sup>15</sup> *Id.*

<sup>16</sup> See *id.*

text, where, in the past two decades, policymaking has shifted substantially from the legislative to the executive branch.<sup>17</sup>

While advisory committees provide valuable advice and insight to governmental policymakers, advisory committees are largely unaccounted for in both number and scope, and their procedures and activities are often left unchecked.<sup>18</sup> In the late 1960s, Congress realized that advisory committees were often dominated by industry professionals with a personal agenda, usually not in the interests of public health, welfare, or the environment.<sup>19</sup> To solve this problem, in 1972, Congress passed the Federal Advisory Committee Act (FACA).<sup>20</sup> FACA governs the establishment of advisory committees and places numerous procedural mandates on advisory committee operations.<sup>21</sup> In large part, Congress passed FACA to cut down on wasteful and duplicative advisory committees and to open advisory committee operations to public scrutiny.<sup>22</sup> Congress expected FACA to eliminate most of the problems that had been occurring under the poorly regulated advisory committee system.<sup>23</sup>

Yet, caselaw and commentary indicate that FACA, as a legislative cure to advisory committee abuse, has failed in many respects.<sup>24</sup> Although FACA provides clear procedural mandates to all advisory committees, in most jurisdictions courts have, in effect, refused to enforce those mandates.<sup>25</sup> From the outset, courts have misconstrued the statutory definition of an advisory committee subject to FACA's mandates.<sup>26</sup> In addition, even in instances of blatant FACA violations, plaintiffs bringing suit for such violations have received no remedy in

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<sup>17</sup> Kit Gage & Samuel S. Epstein, *The Federal Advisory Committee System: An Assessment*, 7 ENVTL. LAW REP. 50001, 50001 (1977); see also *Advisory Committees: United States Senate Hearings on S. 1637 and S. 1964 Before the Subcommittee on Intergovernmental Relations, Committee on Government Operations*, 92d Cong., 1st Sess. 346 (1971) (statement of Prof. Henry Steck, Dept. of Political Science, State Univ. of New York, College of Cortland, Cortland, N.Y.) [hereinafter *Steck testimony*].

<sup>18</sup> See Brown, *supra* note 10, at A23.

<sup>19</sup> See Gage & Epstein, *supra* note 17, at 50001.

<sup>20</sup> FACA, 5 U.S.C. app. §§ 1-15.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; see also Jerry W. Markham, *The Federal Advisory Committee Act*, 35 U. PITT. L. REV. 557, 557 (1974).

<sup>23</sup> See Markham, *supra* note 22, at 562-65.

<sup>24</sup> See, e.g., *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1309 (W.D. Wash. 1994); see generally Brown, *supra* note 10.

<sup>25</sup> See, e.g., *American Petroleum Institute v. Costle*, 665 F.2d 1176, 1190 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982); *Seattle Audubon*, 871 F. Supp. at 1309.

<sup>26</sup> See, e.g., *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 441 (1989); *Food Chem. News v. Young*, 900 F.2d 328, 331 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 846 (1990).

the courts.<sup>27</sup> Courts' failure to enforce FACA often leaves advisory committees without any real incentive to comply with FACA's requirements and frustrates Congress's intent in passing FACA. The only way to promote the legislative intent behind FACA is either: (1) for Congress to amend FACA and clarify any ambiguities; or (2) for courts to reevaluate their current definition of an advisory committee and to begin providing injunctive relief to plaintiffs complaining of FACA violations.<sup>28</sup>

This Comment traces the historical need for legislation to govern executive branch advisory committees, the subsequent passage of FACA and why FACA is not having the effects Congress anticipated. Section II explores the historical background of FACA—in particular, the legislation which preceded FACA and the congressional concerns that led to FACA's passage. Section III discusses the statutory and judicial definitions of an advisory committee subject to FACA's requirements. Section III also examines environmental suits brought against executive agencies and the President for advisory committee violations of FACA. This section focuses on environmental plaintiffs who have used FACA, usually with little success, to attempt to prevent the implementation of regulations or legislation passed on advice from committees in violation of FACA. Section IV analyzes potential amendments to FACA that would provide clearer guidance to courts in their statutory construction and application of FACA. In addition, this section discusses the flawed judicial definition of an advisory committee, as well as the judicial reluctance to provide injunctive relief for FACA violations, both of which frustrate the legislative intent of FACA. Finally, this section addresses the need for courts to reevaluate their current definition of an advisory committee to provide appropriate injunctive remedies for plaintiffs in FACA suits.

## II. FACA'S LEGISLATIVE HISTORY AND PROVISIONS

The executive branch's use of advisory committees has grown at an unprecedented rate in the twentieth century. As the number and use of unregulated advisory committees continued to grow, Congress and the President recognized the need for legislation governing advisory committee operations. The first attempt at regulating advisory com-

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<sup>27</sup> See, e.g., *Seattle Audubon*, 871 F. Supp. at 1309.

<sup>28</sup> The Eleventh Circuit read an injunctive remedy into FACA in *Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103, 1107 (11th Cir. 1994) [hereinafter *Alabama v. DOI*].

mittees came in the form of an Executive Order from President Kennedy. As the inadequacies of the Executive Order became apparent, Congress moved toward passing FACA.

### A. *Historical Background Leading to FACA's Passage*

The use of advisory committees has been long recognized as a valuable way to provide the government with "the best technical brains and experience of all fields of business, industrial or professional endeavor, at little or no cost."<sup>29</sup> However, as the number of advisory committees grew substantially in the first half of the twentieth century, the legislature and executive became increasingly aware that under the then unregulated system, most advisory committees were wholly unaccounted for in number, purpose, and membership.<sup>30</sup> With no regulation, it was likely that some agencies had not formed advisory committees for the purpose of giving advice at all, but rather to promote the objectives of special interest groups—objectives that rarely coincided with the public interest.<sup>31</sup> These problems were particularly likely in environmental advisory committees, which historically were dominated by private industry.<sup>32</sup>

#### 1. The First Attempt at Advisory Committee Regulation: Executive Order 11,007 and Its Weaknesses

Concern over advisory committee abuse led President Kennedy to issue Executive Order 11,007 in 1962 to provide standard minimum regulation of advisory committees not already specifically regulated by statute.<sup>33</sup> Although the Executive Order was an encouraging attempt at regulating advisory committees, the Executive Order's ambiguities and limitations would soon become apparent.<sup>34</sup>

The Executive Order mandated that advisory committees be formed *only* to provide advice.<sup>35</sup> Under the Executive Order, each committee should be reasonably representative of the industrial and

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<sup>29</sup> H.R. REP. NO. 576, 85th Cong., 1st Sess. 2 (1957) (as cited in Markham, *supra* note 22, at 559).

<sup>30</sup> See Markham, *supra* note 22, at 558–60.

<sup>31</sup> *Id.* at 559.

<sup>32</sup> See Gage & Epstein, *supra* note 17, at 50001.

<sup>33</sup> See Exec. Order No. 11,007, § 1, 27 Fed. Reg. 1875 (1962).

<sup>34</sup> See Markham, *supra* note 22, at 560–64.

<sup>35</sup> See Exec. Order No. 11,007, § 4.

geographical segment to which the committee's functions related.<sup>36</sup> Committee meetings were to be held only at the call of, or with approval from, a full-time salaried officer or employee of the department or agency to which the committee reported.<sup>37</sup> This officer was to approve the agenda of any committee meeting, was to keep and certify minutes and transcripts of the meeting, and was to adjourn the meeting whenever the officer considered adjournment to be in the public's best interest.<sup>38</sup> Any committee whose duration was not fixed by law would terminate two years from the date the committee was formed.<sup>39</sup> Termination could be halted if the head of the department or agency utilizing the committee determined, in writing, that continuation of the committee was in the public's best interest.<sup>40</sup> In such case, the committee could continue for another two-year period.<sup>41</sup> To help keep a record of the number and function of all advisory committees, the Executive Order also required that, where practical and not overly expensive, each agency or department utilizing advisory committees record the name and function of its committees, the names and affiliations of committee members, and committee meeting dates.<sup>42</sup> The agency or department was then required to provide this information to the Attorney General and to publish it in its annual report.<sup>43</sup>

Although Executive Order 11,007 was considered a laudable attempt at controlling advisory committees, Congress recognized that the Order had numerous limitations. Accordingly, in 1969 the House Special Studies Subcommittee of the Committee on Government Operations began an intensive study of advisory committees.<sup>44</sup> The study and the congressional testimony that accompanied the study, illuminated some of the regulatory problems that had continued under the Executive Order. A major weakness of the Executive Order was that the Order contained an option to waive *all* administrative require-

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<sup>36</sup> *Id.* § 5.

<sup>37</sup> *Id.* § 6(a).

<sup>38</sup> *Id.* §§ 6(b)–(c).

<sup>39</sup> *Id.* § 8.

<sup>40</sup> Exec. Order No. 11,007, § 8.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* § 10(a).

<sup>43</sup> *Id.* § 10(b).

<sup>44</sup> H.R. REP. NO. 1731, 91st Cong. 2d Sess., intro., 1 (1970). The objective of the study was to review the operations and effectiveness of committees advising the federal government, to assess the possibility of abuse and over-use of committees, and where appropriate to make findings and recommendations for constructive reform. *Id.*

ments, whenever the head of the agency or department to which a committee reported determined that compliance with the Order's mandates was impractical or would interfere with the committee's functions.<sup>45</sup> In addition, there was still no mandatory method of tracking the number of advisory committees, their functions, or their members.<sup>46</sup> At times, advisory committees were even used to delay the solution to a problem, rather than to help solve the problem.<sup>47</sup> The chairman of the advisory committee congressional hearings, Representative John S. Monagan, described advisory committees as "sort of like satellites, I think of them that way . . . they go out into outer space but they keep circling around, you know, and no one really knows how many there are or what direction they are going in, or what duplication there is."<sup>48</sup>

The biggest limitation of the Executive Order was that the Order did little to prevent industry professionals from dominating advisory committees.<sup>49</sup> The Executive Order allowed an agency to form advisory committees made up only of industrial representatives.<sup>50</sup> These committees were often self-serving, did not represent the public interest, and were irresponsible and arbitrary in their use of power.<sup>51</sup> Congressional testimony indicated that at times the advisors themselves, not the government officials utilizing the advisors, were responsible for final decisionmaking.<sup>52</sup> This responsibility gave industry professionals power at the electoral, policy-making, and implementation levels.<sup>53</sup>

Testimony throughout the congressional hearings illustrated why industry-dominated advisory groups, which remained common despite the Executive Order, were such a substantial problem in the environmental context. Senate testimony pointed out that environ-

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<sup>45</sup> *Id.* at 9; Exec. Order No. 11,007, § 6(f); see also Markham, *supra* note 22, at 564.

<sup>46</sup> See FACA, 5 U.S.C. app. §§ 2(a)-(b).

<sup>47</sup> Markham, *supra* note 22, at 563.

<sup>48</sup> H.R. REP. NO. 1731, *supra* note 44, at 2.

<sup>49</sup> See Exec. Order No. 11,007, § 5. This broad section of the Executive Order only required that advisory committees be "reasonably representative of the group of industries, the single industry, or the geographical, service, or product segment thereof to which it relates. . . ." *Id.* The Executive Order still allowed the existence of advisory committees made up only of industrial professionals, as long as there was a representative group thereof. *Id.* The Executive Order did not require that advisory committees contain members from outside industry. *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Markham, *supra* note 22, at 563.

<sup>52</sup> *Id.* at 565; see also Steck testimony, *supra* note 17, at 346-47.

<sup>53</sup> Markham, *supra* note 22, at 565; see also Steck testimony, *supra* note 17, at 346-47.



mental policymaking had been assumed primarily by the federal government and had shifted from control by Congress, which answers directly to its constituency, to control by executive agencies, which only answer to the executive branch that creates the agencies.<sup>54</sup> The establishment of the Environmental Protection Agency (EPA) and the Council on Environmental Quality and the enactment of the National Environmental Policy Act<sup>55</sup> had established an administrative base for environmental policy.<sup>56</sup> The executive decision-making process, which relies heavily on advisory committee findings, can effect the outcome of agency decisions and can have a dramatic effect on the substance of those decisions.<sup>57</sup> "[O]ne very great danger is that industry will gain an inordinate power in the administrative process and that the public will no longer be in a position to bring a countervailing influence to bear."<sup>58</sup>

Senate testimony contained a specific example of the influence industry had on environmental policy. In 1970, President Nixon established the National Industrial Pollution Control Council (Council), an advisory committee composed of chief executives of major American industries and trade associations.<sup>59</sup> Not one member of the Council came from an ecological or conservation group, state or local government, or consumer interest group.<sup>60</sup> Nixon established the Council to advise him on federal legislation and regulations relating to pollution control and abatement.<sup>61</sup> Nixon made it clear that the Council was to be the vital link between industry and government in establishing environmental policy.<sup>62</sup> One critic of the Council stated that "[it] constitut[ed] a prominent device by which industry is institutionally and legitimately joined to the structure of government decisionmaking. The system . . . forms . . . a kind of shadow branch of government."<sup>63</sup> The criticism was that Nixon's broad mandate for the Council could make its power and influence so great that the Council, an advisory committee, could have an environmental impact equal to that of a

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<sup>54</sup> *Steck testimony*, *supra* note 17, at 346.

<sup>55</sup> National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1994).

<sup>56</sup> *Steck testimony*, *supra* note 17, at 346.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 351.

<sup>60</sup> *Id.*

<sup>61</sup> *Steck testimony*, *supra* note 17, at 347-48.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

regulatory executive agency like the EPA.<sup>64</sup> According to one commentator, the President had delegated public policymaking to a private group of industrial professionals.<sup>65</sup> Such delegation blurs the distinction between public and private interests and results in one-sided public policy.<sup>66</sup> Considering the enormous scientific, informational, financial, and legal resources that industry has under its control, there is a legitimate danger that public policy will be unduly influenced.<sup>67</sup> Even the chairman of Nixon's Council recognized the power the Council could wield.<sup>68</sup> In fact, the chairman had urged the industrial Council members to develop environmental policies of their own, rather than be forced to tailor their industrial operations to policies "legislated upon them" by the federal government.<sup>69</sup>

In addition to allowing advisory committees made up of only industrial professionals, the Executive Order also allowed advisory committees to hold their meetings behind closed doors.<sup>70</sup> For example, in

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<sup>64</sup> *Id.*

The reason for this is obvious. The control of information, advice and support to the policy makers is a material form of power for an advisory committee. It is a form of power which an agency official can ill afford to ignore and which can determine the real as distinct from the apparent public success of the policy itself.

*Id.* at 348.

<sup>65</sup> See *Steck testimony*, *supra* note 17, at 355.

<sup>66</sup> *Id.*

<sup>67</sup> See *id.* at 348.

<sup>68</sup> *Advisory Committees: United States Senate Hearings on S. 1637 and S. 1964 Before the Subcommittee on Intergovernmental Relations, Committee on Government Operations*, 92d Cong., 1st Sess. 410-11 (1971) (statement of Bert S. Cross, Chairman, National Industrial Pollution Control Council, and Chairman, Finance Committee, Minnesota Mining & Manufacturing Co.) [hereinafter *Cross testimony*].

<sup>69</sup> *Steck testimony*, *supra* note 17, at 348. In the words of a critic of the council:

pollution control regulations and pollution abatement technology will introduce a host of new and very costly factors into the industrial system. The council is in a position to help rationalize a new and possibly disruptive force as well as to influence the emergence of a new growth industry in pollution control. . . . [T]he council might well become the focal point for a measure of industrial self-government and so give an unfortunate quasi-corporate character to the linkage between the industrial community and the environmental bureaucracy.

*Id.*

<sup>70</sup> Exec. Order No. 11,007, §§ 6(c)-(d). All that the Executive Order required was that an advisory committee keep minutes of each meeting containing a minimum of the persons present, a description of matters discussed, and conclusions reached. In addition, advisory committees were to include with the minutes copies of all reports received, issued, or approved by the committee. Finally, the Executive Order required an advisory committee to keep a verbatim transcript of all committee meetings. However, this requirement easily could be waived if the head of the department or agency utilizing the committee stated that waiver was in the public interest. *Id.*

order to keep track of the Council's activities, representatives of ten conservation groups had requested and had been denied access to the Council's meetings.<sup>71</sup> As one commentator noted, "the power of a committee to develop its own environmental policies, rather than to 'submit' to those policies the government might force upon the committee, becomes even more threatening when the committee's meetings are closed to the public."<sup>72</sup> In a closed meeting, there is no method for non-industrial groups to influence the policies the advisory committee has been given power to implement.<sup>73</sup> This barrier to public participation eliminates the opportunity to address policy alternatives that might have been raised by industry outsiders.<sup>74</sup> As Senator Lee Metcalf, a sponsor of the Open Advisory Committee Act, a predecessor to FACA stated:

[b]ecause [the Council] is a closed group, its recommendations are bound to be suspect. At the very least, there should be a certain percentage of observers there to allay the public's suspicions that this closed group is sitting there to assure the continuation of the kind of pollution that they have caused for years.<sup>75</sup>

To further illustrate his point, Senator Metcalf discussed another example of the type of advisory committee abuse that continued to occur, despite the Executive Order.<sup>76</sup> In the late 1960s, environmentalists had been publicizing the dangers of phosphates in laundry detergent, and the public was clamoring for a solution.<sup>77</sup> The laundry

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<sup>71</sup> *Steck testimony*, *supra* note 17, at 351.

<sup>72</sup> *Id.* at 350.

<sup>73</sup> *See id.*

<sup>74</sup> *Id.* Senate testimony stated that: "the relative cloak of secrecy surrounding its work would not in my judgment exist unless the Council were seeking to enjoy a privileged and closed relationship with the highest levels of Government in the area of governmental policy." *Id.* at 351.

<sup>75</sup> *Cross testimony*, *supra* note 68, at 411. Senator Metcalf went on to say that the President had created a closed, special club of the outstanding industrialists throughout the country and they are the people who have contributed the most to environmental pollution. "[W]hen [industrial advisory committees] meet with sanitized minutes, how will we ever know what the conclusions and what the discussions are?" *Id.* Professor Steck continued his testimony by stating that:

as long as peak bodies like the industrial council are in a position to control the flow of advice and knowledge and as long as that position is closed, the system cannot be regarded as neutral and therefore impersonally open and responsive to the general public, to public interest groups, or to non-industrial groups. By its very structure, the process is biased in favor of some things and against others.

*Steck testimony*, *supra* note 17, at 356.

<sup>76</sup> *See Cross testimony*, *supra* note 68, at 415.

<sup>77</sup> *See id.* n.2.

detergent industry faced a public relations nightmare that could significantly affect its sales.<sup>78</sup> In 1970, the Detergent Subcouncil, an advisory committee consisting solely of representatives from the laundry detergent industry, issued a report for the Secretary of Commerce containing a possible solution to the phosphate scare.<sup>79</sup> The Detergent Subcouncil's report recommended the use of a new material called nitrilotriacetic acid (NTA) as a safe replacement for phosphates in laundry detergent.<sup>80</sup> The Detergent Subcouncil indicated that after extensive human and environmental safety tests, levels of NTA which would be used in the detergent were safe for people and for the environment.<sup>81</sup> Yet, earlier that same year, Dr. Samuel Epstein, Chief of the Environmental Toxicology Carcinogenic Children's Cancer Research Center, told a Senate subcommittee that the proposed use of NTA should be disallowed because studies had shown NTA to be related to cancer and audiogenic defects.<sup>82</sup> One year after issuing its report, the Detergent Subcouncil advisory committee admitted that, based on information from outside experiments conducted subsequent to its report, significant portions of the report were rendered obsolete and misleading.<sup>83</sup> The Surgeon General and the Administrator of the EPA were then forced to halt the implementation of NTA.<sup>84</sup> Senator Metcalf suggested that if the public had been apprised of the Detergent Subcouncil's activities and allowed to participate in its meetings, the dangers of NTA might have come to light much earlier.<sup>85</sup>

It is clear from these examples of congressional testimony that, although Executive Order 11,007 was a promising beginning to advisory committee regulation, the Order had its problems. Many of these problems were subsequently addressed by FACA.

## 2. The Next Attempt at Regulating Advisory Committees: Congress Moves Toward Passing FACA

Advisory committee abuses such as those described above, led the House of Representatives to introduce Bill 4383 on February 17,

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<sup>78</sup> *See id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Cross testimony, supra* note 68, at 415.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 415-16.

<sup>85</sup> *See id.* at 415-17.

1971.<sup>86</sup> Bill 4383 had two primary purposes. Bill 4383's first purpose was to correct the inadequacies existing under Executive Order 11,007.<sup>87</sup> Bill 4383's second purpose was to address the fear that many advisory committees were nothing more than governmentally funded, privately conducted, industry trade associations.<sup>88</sup> Bill 4383 had no option for an agency to waive its requirements, a weakness that existed under the Executive Order.<sup>89</sup>

The House of Representatives concern that advisory committees be well-balanced was accompanied by the Senate's concern that advisory committee meetings were not open to the public.<sup>90</sup> These "secret" committees were advising elected and appointed government officials and creating a government not accountable to the public.<sup>91</sup> The House and Senate subsequently introduced numerous additional bills. One was Senate Bill 1637, the Open Advisory Committee Act, introduced by Senator Metcalf, which proposed drastic changes in the advisory committee system.<sup>92</sup> Bill 1637 required, among other things, that advisory committee meetings be open to the public, that membership on advisory committees be fairly balanced, and that noncompliance with the Act could be challenged in court.<sup>93</sup> Bill 1637 required that one-third of the membership of any advisory committee must come from the public sector, unrelated to either industry or government.<sup>94</sup> The less restrictive House Bill 4383 was similar in intent, though not as strong in its mandates as Bill 1637. Bill 4383 eventually became the basis for FACA.<sup>95</sup>

*B. FACA's Provisions and How They Were Expected to Cure  
Advisory Committee Abuses Which Continued Under Executive  
Order 11,007*

Congress enacted FACA on October 6, 1972, in recognition that stringent regulation of executive branch advisory committees was both necessary and overdue.<sup>96</sup> FACA illustrates Congress's determi-

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<sup>86</sup> H.R. 4383, 92d Cong., 1st Sess. 1 (1971).

<sup>87</sup> See generally *Steck testimony*, *supra* note 17 and accompanying text.

<sup>88</sup> *Id.*; see also Markham, *supra* note 22, at 565.

<sup>89</sup> Exec. Order No. 11,007 § 6(f).

<sup>90</sup> See H.R. REP. NO. 1731, *supra* note 44, at 7; *Cross testimony*, *supra* note 68, at 411-12.

<sup>91</sup> *Cross testimony*, *supra* note 68, at 411.

<sup>92</sup> See Gage & Epstein, *supra* note 17, at 50001.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> FACA, 5 U.S.C. app. §§ 1-2; see also H.R. REP. NO. 1731, *supra* note 44, at 6-7.

nation to control this powerful "fifth arm of government," which had become nearly as powerful as the administrative agencies—often labeled the fourth arm of government—that created the advisory committees.<sup>97</sup>

FACA was enacted to cut down on waste created by unnecessary and duplicative advisory committees, to open committee meetings to public scrutiny and participation, and to ensure that the committees be made up of a well-balanced membership and not dominated by private special interest groups.<sup>98</sup> To promote these goals, FACA is both administrative—in that it places specific requirements on the establishment and operation of advisory committees—and remedial—in that it seeks to correct abuses in the advisory committee system.<sup>99</sup>

One aim of FACA was to cut governmental spending by limiting the number of advisory committees.<sup>100</sup> To achieve this goal, FACA requires that the President or an executive agency may only establish *essential* new advisory committees.<sup>101</sup> An advisory committee is essential under FACA when the work the committee will do is not and cannot be done by an existing committee.<sup>102</sup> FACA also requires automatic termination of an advisory committee after two years or when the committee is no longer carrying out its purpose.<sup>103</sup>

Another aim of FACA was to eliminate industry domination of advisory committees.<sup>104</sup> To encourage public participation in the advisory committee process, FACA requires that all advisory committees publish in the *Federal Register* the date and location of meetings, open meetings to public scrutiny and participation, and make detailed minutes, transcripts, and other documents from these meetings available for public inspection.<sup>105</sup> In addition, to prevent private industry

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<sup>97</sup> Markham, *supra* note 22, at 557. The first four arms of the government included the legislative, executive, and judicial branches, as well as administrative agencies, which had been characterized as the fourth arm of the government. 118 CONG. REC. H. 4275 (daily ed. May 9, 1972) (remarks of Rep. Monagan) (as cited in Markham, *supra* note 22, at 557).

<sup>98</sup> FACA, 5 U.S.C. app. §§ 2,5.

<sup>99</sup> Markham, *supra* note 22, at 570–71.

<sup>100</sup> See H.R. REP. NO. 1731, *supra* note 44, at 5–7.

<sup>101</sup> FACA, 5 U.S.C. app. § 2(b)(2).

<sup>102</sup> *Id.* § 5(a); see also Markham, *supra* note 22, at 579.

<sup>103</sup> FACA, 5 U.S.C. app. § 14.

<sup>104</sup> See H.R. REP. NO. 1731, *supra* note 44, at 7.

<sup>105</sup> FACA, 5 U.S.C. app. §§ 2,5. See also *Food Chem. News v. Department of Health and Human Servs.*, 980 F.2d 1468, 1469 (D.C. Cir. 1992), which states that such requirements shall not apply to any portion of an advisory committee meeting where the President or the head of the agency to which the committee reports determines that such portion of the meeting may be closed to the public in accordance with 5 U.S.C. § 552b(c), the Freedom of Information Act. Under § 10(b) of FACA, unless the information is exempt from FACA under the Freedom of

from dominating advisory committees, FACA requires that each advisory committee consist of a balanced membership.<sup>106</sup> Although "balanced membership" was not specifically defined in FACA, commentators have agreed that it means an advisory committee which is broadly representative of all sectors of the public with an interest in the subject matter of the committee.<sup>107</sup> For example, an advisory committee with a balanced membership might consist of industry and local government representatives, an environmental group representative, a university professor, a labor union member, and a private citizens group member.

FACA vests advisory committee oversight in the General Services Administration (GSA) of the Office of Management and Budget, and the standing committees of the Senate and the House of Representatives that have jurisdiction over the advisory committee.<sup>108</sup> These groups are responsible for overseeing the creation and termination of advisory committees and for ensuring that the committees comply with FACA's procedural requirements.<sup>109</sup>

### III. THE JUDICIAL INTERPRETATION AND APPLICATION OF FACA

At present, FACA is used by both environmental and industrial plaintiffs to halt the implementation of regulations based on advice from advisory committees operating in violation of FACA. Courts, in deciding FACA cases, have first had to address the definition of an advisory committee subject to FACA's mandates. Courts also have had to address the question of who has standing to sue for FACA violations. Even when courts have decided the standing question

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Information Act, an agency is generally obligated to make all documents available for public inspection and copying. It is not necessary that a member of the public request disclosure in order for the materials to be made available. *Food Chem. News*, 980 F.2d at 1469.

<sup>106</sup> FACA, 5 U.S.C. app. § 5(b)(2). See also *Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods*, 708 F. Supp. 359, 364 (D.D.C. 1988) [hereinafter *National Advisory Comm.*] in which the United States District Court for the District of Columbia held a committee to be fairly balanced. The committee was formed to provide advice and recommendations to the Secretaries of Agriculture and Health and Human Services on the development of microbiological criteria by which the safety and wholesomeness of food could be assessed. *National Advisory Comm.*, 708 F. Supp. at 360. The committee was made up of two university professors, one state agriculture department official, one state department of agriculture and consumer services official, two people employed by food research firms, six people employed by federal agencies, and six people employed by private food companies. *Id.*

<sup>107</sup> Gage & Epstein, *supra* note 17, at 50001.

<sup>108</sup> FACA, 5 U.S.C. app. §§ 5,7.

<sup>109</sup> *Id.*

favorably and when a committee is found to be an advisory committee subject to FACA, plaintiffs in FACA suits have been relatively unsuccessful.

A. *To Whom Does FACA Apply?—The Statutory and Judicial Definitions of an Advisory Committee*

The statutory definition of an advisory committee subject to FACA is quite broad, indicating that Congress expected FACA's application to be broad as well.<sup>110</sup> Yet, as with most statutory construction, courts realized that for practical purposes, they had to put some parameters on FACA's application.<sup>111</sup> In an attempt to limit and clarify the definition of an advisory committee subject to FACA, courts have turned a comprehensive and objective statutory definition into one that is limited, subjective, and ambiguous, and have subsequently excluded numerous groups from the definition of an advisory committee.<sup>112</sup>

FACA defines an advisory committee as the following:

any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof which is (A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.<sup>113</sup>

FACA's definition includes as an advisory committee any advisory group established by the executive branch, as well as any group established outside the executive branch but utilized by either an executive agency or the President.<sup>114</sup> Although the definition appears to be quite broad, courts have attempted to limit its scope, making FACA's application less comprehensive than a literal reading of FACA's language would indicate.<sup>115</sup> As one court stated, if read liter-

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<sup>110</sup> *Id.* § 3(2). See also Markham, *supra* note 22, at 571 stating that FACA's purposes will be accomplished only if FACA is interpreted broadly.

<sup>111</sup> See, e.g., *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 441 (1989); *Food Chem. News v. Young*, 900 F.2d 328, 331 (D.C. Cir. 1990).

<sup>112</sup> See, e.g., *Public Citizen*, 491 U.S. at 441; *Food Chem. News*, 900 F.2d at 331.

<sup>113</sup> FACA, 5 U.S.C. app. § 3 specifically excludes the Advisory Commission on Intergovernmental Relations, the Commission on Government Procurement, the Central Intelligence Agency, and the Federal Reserve System. FACA also specifically excludes any committee which is wholly made up of full-time officers or employees of the Federal government. *Id.*

<sup>114</sup> See *id.*

<sup>115</sup> See, e.g., *Public Citizen*, 491 U.S. at 454.



ally, FACA would apply to any conversation between two or more people supplying information to any government official.<sup>116</sup> According to courts, applying FACA to all such situations would effectively stifle much of the daily intercourse between government and the rest of the nation.<sup>117</sup> Yet, in courts' attempts to restrict the definition of an advisory committee, the definition has become rather muddled. As a result, there is no clear test to determine whether a committee is an advisory committee within the meaning of FACA or simply a group rendering advice but not subject to FACA's terms.<sup>118</sup>

In the Supreme Court's most recent attempt at defining an advisory committee, the Court changed the definition from an objective one, as stated in FACA, to a subjective one. In *Public Citizen v. United States Department of Justice*,<sup>119</sup> the plaintiff argued that the Standing Committee on the Federal Judiciary of the American Bar Association (ABA Committee) was an advisory committee within the meaning of FACA and should therefore operate in compliance with FACA. However, for years the ABA Committee had advised the President on potential judicial nominees without complying with FACA.<sup>120</sup>

In deciding whether the ABA Committee was an advisory committee subject to FACA, the Court examined the legislative history of FACA and determined that FACA was enacted to cure specific abuses Congress had found to pervade the advisory committee system—in particular, wasted funds for worthless committees, closed meetings, and biased proposals by special interest groups.<sup>121</sup> The Court stated that, based on FACA's purpose, it was unlikely that Congress expected FACA to apply to every formal and informal consultation between the President or an executive agency and a group rendering advice.<sup>122</sup> Based on this reading, the Court held that FACA should apply to an advisory committee only when the advisory committee system is in danger of being abused, as contemplated by Congress.<sup>123</sup> Applying this reasoning, the Court held that the ABA Committee was

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<sup>116</sup> *Natural Resources Defense Council v. Herrington*, 637 F. Supp. 116, 117–18 (D.D.C. 1986).

<sup>117</sup> *Id.*

<sup>118</sup> *See, e.g., id.*

<sup>119</sup> *Public Citizen*, 491 U.S. at 440.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* The United States Court of Appeals for the District of Columbia Circuit, in *Food Chemical News v. Young*, interpreted the Supreme Court's reading in *Public Citizen* as limiting FACA to "groups organized by or closely tied to the Federal government and thus enjoying

not an advisory committee subject to FACA because there was little danger that the ABA Committee procedures would be abused.<sup>124</sup> The Court's subjective definition of an advisory committee conflicts with the objective definition of an advisory committee under FACA's language. FACA's language would include any group either formed or utilized by an executive agency for the purpose of rendering advice.<sup>125</sup> The Court's definition, however, only requires that a committee comply with FACA where a court decides that the committee is in danger of abusing the advisory committee system.

This subjective interpretation of what constitutes an advisory committee subject to FACA has resulted in numerous groups being exempt from FACA's requirements. For example, as discussed, the Court excluded the ABA Committee from the definition of an advisory committee despite the fact that the ABA Committee is "utilized" by the President, as defined in FACA.<sup>126</sup> The United States District Court for the District of Columbia excluded from the definition of an advisory committee, a group of six scientists organized by the Secretary of Energy to study the safety of a government-owned nuclear reactor in Washington.<sup>127</sup> This group was established by an executive agency for the purpose of rendering advice. However, applying the subjective definition of an advisory committee, the court excluded the scientific committee because it found no danger that the committee would abuse the advisory committee process.<sup>128</sup> The United States District Court for the District of Columbia also excluded a group of nine governors convened to provide advice to the EPA regarding the problem of states' abilities to carry out federally delegated programs to ensure safe drinking water.<sup>129</sup> In each of these cases, a court used the subjective definition of an advisory committee to find that FACA did not apply because there was no danger of promoting the evils

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quasi-public status." *Food Chemical News v. Young*, 900 F.2d 328, 331 (D.C. Cir. 1990); *see also Public Citizen*, 491 U.S. at 440. The court in *Food Chemical News* held that this definition of an advisory committee did not apply to a panel of experts established and utilized by a private organization and government contractor. 900 F.2d at 331. The court held that the committee did not have a quasi-public status and was therefore different from an advisory committee established by a public executive agency. *Id.*

<sup>124</sup> *Public Citizen*, 491 U.S. at 440.

<sup>125</sup> *Id.*

<sup>126</sup> *See generally, id.*

<sup>127</sup> *Natural Resources Defense Council v. Herrington*, 637 F. Supp. 116, 117 (D.D.C. 1986).

<sup>128</sup> *Id.* at 120.

<sup>129</sup> *Natural Resources Defense Council v. Environmental Protection Agency*, 806 F. Supp. 275, 276-78 (D.D.C. 1992).

Congress was trying to cure in passing FACA. Because courts found none of these groups to be an advisory committee, none were subject to FACA's requirements.

*B. How FACA Has Been Used as an Environmental Cause of Action*

1. Standing to Sue for FACA Violations

FACA is one way for environmental plaintiffs to attempt to halt the implementation of legislation or regulations passed on advice from an advisory committee. FACA does not expressly provide for judicial process by which a member of the public may seek to enforce its requirements. Yet, violations of agency regulations in general have been recognized as a legitimate cause of action since *Sierra Club v. Morton*.<sup>130</sup> In *Sierra Club*, the Supreme Court applied the Administrative Procedure Act (APA)<sup>131</sup> to the standing question. The APA states, in relevant part, that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."<sup>132</sup> The Court interpreted this language to mean that under the APA, persons had standing to obtain judicial review where the persons alleged that (1) an agency's violation of a statute had caused them "injury in fact," and (2) the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated by the statute the agency was alleged to have violated."<sup>133</sup> The Court in *Sierra Club* held that as long as the plaintiff was among those injured, the alleged injury—threat to aesthetic and environmental well-being—was a legitimate injury.<sup>134</sup> The fact that such an environmental interest may be shared by many rather than by just a few would not make a plaintiff less deserving of legal protection through the judicial process.<sup>135</sup>

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<sup>130</sup> *Sierra Club v. Morton*, 405 U.S. 727, 732–34 (1971).

<sup>131</sup> Administrative Procedure Act (APA), 5 U.S.C. § 702 (1994).

<sup>132</sup> *Sierra Club*, 405 U.S. at 732–33.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 734.

<sup>135</sup> *See id.*

In *Sierra Club* the Court provided standing to sue for harm caused when an administrative agency violates a statute or regulation.<sup>136</sup> The Court affirmed standing to sue specifically under FACA in *Public Citizen v. United States Department of Justice*.<sup>137</sup> In *Public Citizen*, the Court held that a committee's refusal to allow the plaintiff to scrutinize its activities as required by FACA constituted a sufficiently distinct injury to provide standing.<sup>138</sup> Under such circumstances, the administrative agency which established the advisory committee is the object of the suit, as the agency is responsible for ensuring that its advisory committees comply with FACA.<sup>139</sup>

Once a plaintiff claims it has been sufficiently injured by a FACA violation to meet the standing requirement, FACA enables special interest groups, private citizens, and industry professionals to ensure open access to advisory committee meetings and to argue against the implementation of rules and regulations promulgated by an executive agency on advice from a committee acting in violation of FACA. In most of these cases, however, and particularly in the environmental context, plaintiffs suing for FACA violations have met with relatively little success.

## 2. Examples of Unsuccessful Attempts to Bring Actions in Environmental Cases for FACA Violations

Both environmental and industrial groups have used FACA to attempt—usually unsuccessfully—to block the implementation of regulations promulgated on advice from an advisory committee allegedly in violation of FACA. In one such case, *American Petroleum Institute v. Costle*, the plaintiffs were an environmental conservation group and an industrial group that would be affected by newly promulgated regulations.<sup>140</sup>

In 1980, the Natural Resources Defense Council (NRDC) argued that the EPA, under the Clean Air Act,<sup>141</sup> had established primary and secondary national ambient air quality standards (NAAQS) for

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<sup>136</sup> *Id.*

<sup>137</sup> *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 451 (1989).

<sup>138</sup> *Id.* at 440.

<sup>139</sup> See generally, *id.*

<sup>140</sup> *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981) [hereinafter *API v. Costle*].

<sup>141</sup> Clean Air Act, 42 U.S.C. § 7401 (1994).

ozone that were too lenient.<sup>142</sup> In the same action, the American Petroleum Institute (API) and the City of Houston argued that the standards were too stringent.<sup>143</sup> The plaintiffs sued the EPA and requested injunctive relief for FACA violations.<sup>144</sup>

The EPA had retained a panel of paid expert environmental consultants (the Shy Panel) to assist it in establishing the NAAQS.<sup>145</sup> The Shy Panel was responsible for determining the level of ozone concentration that might cause adverse health effects and for reporting those findings to the EPA.<sup>146</sup> The plaintiffs argued that the Shy Panel was an advisory committee within the meaning of FACA and that, because the EPA failed to follow FACA's requirements in establishing and controlling the panel, the EPA's subsequent reliance on the panel's study and advice required invalidation of the resulting air quality standard.<sup>147</sup>

The Shy Panel held private meetings and drafted a report which the panel submitted to the EPA.<sup>148</sup> The plaintiffs complained that the Shy Panel violated FACA by failing to provide public notice of panel meetings and by prohibiting the public from participating in the meetings.<sup>149</sup> The plaintiffs also argued that the choice of a known partisan to head the committee violated FACA's requirement that an advisory committee be fairly balanced and not inappropriately influenced by a special interest.<sup>150</sup>

The Shy Panel appears to fit FACA's definition of an advisory committee, which applies to "any panel . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations."<sup>151</sup> Yet, the United States Court of Appeals for the District of Columbia Circuit declined to reach the issue of whether the Shy Panel was an advisory committee under FACA.<sup>152</sup> The court held that even if the Shy Panel was an advisory committee subject to FACA, and even if FACA violations had occurred, there was no evidence that had the committee complied with all of FACA's require-

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<sup>142</sup> *API v. Costle*, 665 F.2d at 1181.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *API v. Costle*, 665 F.2d at 1189.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> FACA, 5 U.S.C. app. § 3.

<sup>152</sup> *API v. Costle*, 665 F.2d at 1190.

ments, the EPA's resulting NAAQS would have been any different.<sup>153</sup> Even if EPA reliance on the panel's study was illegal, the court chose not to invalidate the subsequent air quality standards based solely on the procedural violations.<sup>154</sup>

Equally unsuccessful in a FACA suit were several non-profit plaintiffs in *Seattle Audubon Society v. Lyons*.<sup>155</sup> *Seattle Audubon* was the culmination of a series of lawsuits fighting the implementation of the Clinton Administration's "Forest Plan for a Sustainable Economy and a Sustainable Environment" (Forest Plan) for over twenty-four million acres of federally owned forest lands in the Pacific Northwest.<sup>156</sup> The plaintiffs were a not-for-profit association called the Northwest Forest Resource Council (NFRC), which represented the interests of the timber and other forest-products industries in Oregon and Washington, and the Native Forest Council, a public interest group whose purpose was to protect forest lands.<sup>157</sup> The defendants were the United States Secretaries of Agriculture and the Interior, the Forest Ecosystem Management Assessment Team (FEMAT), and FEMAT's chairman.<sup>158</sup> President Clinton had established FEMAT to employ an "ecosystem" approach to achieve the greatest possible economic and social contribution from the forests.<sup>159</sup> FEMAT was made up of six sub-teams and fourteen advisory groups.<sup>160</sup> Altogether, between six and seven hundred people contributed to FEMAT's final report, at a total cost to the government of \$3.1 million.<sup>161</sup>

FEMAT compiled a report of ten forest management options.<sup>162</sup> Option nine became the basis for President Clinton's Forest Plan released on July 1, 1993.<sup>163</sup> The plaintiffs in *Seattle Audubon* argued that FEMAT was an advisory committee within the meaning of FACA and that the committee's refusal to allow the plaintiffs and the public to attend its meetings rendered the meetings and their results

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<sup>153</sup> *Id.* This holding seems to be akin to a harmless error standard, although the court did not expressly state it as such. See *id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1299-1301 (W.D. Wash. 1994).

<sup>156</sup> *Id.* at 1299-1300.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1309.

<sup>159</sup> *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009, 1011 (D.D.C. 1994) (one of several lower court opinions which culminated in *Seattle Audubon*).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1303 (W.D. Wash. 1994).

<sup>163</sup> *Id.* at 1304.

invalid.<sup>164</sup> The plaintiffs sought declaratory relief stating that FEMAT was indeed an advisory committee—and injunctive relief barring the defendants from relying on FEMAT's report, compiled in violation of FACA.<sup>165</sup>

The United States District Court for the Western District of Washington found that FEMAT was an advisory committee and that the committee had violated FACA.<sup>166</sup> Specifically, FEMAT had not been established under a charter, as FACA required.<sup>167</sup> FEMAT failed to publish notice of its meetings in the *Federal Register* and refused to open its meetings to the public.<sup>168</sup> In addition, FEMAT neglected to make records and other documents available for public view and neglected to keep detailed minutes of meetings.<sup>169</sup> Finally, FEMAT made no attempt to ensure that its membership was fairly balanced and that the advice and recommendations FEMAT rendered were not inappropriately influenced by any special interests.<sup>170</sup>

Turning to the plaintiffs' remedial requests, the court acknowledged that FACA does not specifically prescribe remedies for violations of its mandates.<sup>171</sup> Therefore, the court concluded it must "exercise its general equitable powers to fashion relief that would represent the appropriate remedy for plaintiff's injuries caused by the violation[s] of FACA."<sup>172</sup> The court issued declaratory relief stating that FEMAT was an advisory committee and had violated FACA.<sup>173</sup> The court, however, refused injunctive relief, stating that an injunction enjoining utilization of FEMAT's report would exceed the plaintiffs' injuries.<sup>174</sup> The court found nothing in the evidence to indicate that even if FEMAT had scrupulously complied with FACA, FEMAT's report, advice, or recommendations would have been any different.<sup>175</sup> The court stated that an injunction would be premature, as at the time of the suit, the Forest Plan, based on FEMAT's report,

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<sup>164</sup> *Id.* at 1309.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Seattle Audubon*, 871 F. Supp. at 1309; *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009, 1013–14 (D.D.C. 1994).

<sup>168</sup> *Espy*, 846 F. Supp. at 1013–14.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1014.

<sup>172</sup> *Id.*

<sup>173</sup> *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1309 (W.D. Wash. 1994).

<sup>174</sup> *Id.* at 1309–10.

<sup>175</sup> *Id.* at 1310.

was simply a plan.<sup>176</sup> “[The Forest Plan] had yet to be translated into action. There will be time enough when the Forest Plan is implemented to determine if any harm it does to NFRC and its constituents can be traced to FEMAT.”<sup>177</sup> According to critics of the opinion, however, by the time the Forest Plan was implemented, it would be too late to remedy any damage which the Forest Plan might have caused.<sup>178</sup>

These cases are illustrative of the difficulty plaintiffs have had obtaining injunctive relief in environmental suits brought for FACA violations despite the clear FACA violations. However, a case from the United States Court of Appeals for the Eleventh Circuit is an encouraging exception.

### 3. A Plaintiff Succeeds in an Environmental Suit Based on FACA Violations

It was not until *Alabama-Tombigbee Rivers Coalition v. Fish & Wildlife Service of the United States Department of the Interior* that a plaintiff prevailed in an environmental action brought under FACA and received injunctive relief.<sup>179</sup> The relevant events leading up to the suit began in June, 1993, when the Fish and Wildlife Service (FWS) published a proposed rule to list the Alabama Sturgeon as an endangered species and to designate the fish's habitat as critical.<sup>180</sup> Under the Endangered Species Act, once a rule is proposed, the Secretary of the Interior has one year either to promulgate a final rule listing the species as endangered or to withdraw the FWS's proposed rule.<sup>181</sup>

To assist in the decision whether or not to list the Alabama Sturgeon as endangered, the Secretary of the Interior ordered the FWS to organize a scientific advisory panel to “consider the best available scientific information and assess the current status of the species.”<sup>182</sup> The FWS organized a panel of four scientists to provide advice to both the FWS and the Secretary of the Interior.<sup>183</sup> The Alabama congres-

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *California Forestry Association Vice President Issues Statement*, PR Newswire, Dec. 21, 1994, available in LEXIS, News Library, Wires File.

<sup>179</sup> *Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103, 1103 (11th Cir. 1994) [hereinafter *Alabama v. DOI*].

<sup>180</sup> *Id.* at 1104.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1104-05.

<sup>183</sup> *Id.*



sional delegation immediately raised concerns regarding the panel's size and composition.<sup>184</sup> The congressional delegation recommended increasing the panel's size to improve its objectivity, and proposed six scientists as possible candidates.<sup>185</sup> The FWS did increase the membership of the panel from four to nine. However, of those nine members, none were drawn from the six scientists the congressional delegation had proposed.<sup>186</sup> Three of the nine members came from the original four-member panel which had initially caused the congressional delegation to be concerned about the panel's objectivity.<sup>187</sup>

At this point, the plaintiff, Alabama-Tombigbee Rivers Coalition (Coalition), became involved.<sup>188</sup> The Coalition was comprised of thirty-four public organizations and businesses that operated in Alabama and Mississippi.<sup>189</sup> The Coalition was concerned that listing the Alabama Sturgeon as endangered, and its habitat as critical, would have an adverse impact on thousands of jobs.<sup>190</sup> In order to ensure an open discussion of the issues, the Coalition wrote to the Solicitor for the Department of the Interior to request his assurance that the panel would comply with FACA.<sup>191</sup> Although the Solicitor assured the Coalition that the scientific advisory committee would comply with FACA, the committee subsequently violated most of FACA's provisions.<sup>192</sup>

The Coalition filed a complaint seeking a temporary restraining order and preliminary and permanent injunctions against the release of, use of, and reliance on the scientific advisory committee's report.<sup>193</sup> In response, before the preliminary injunction could be issued, the

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<sup>184</sup> *Alabama v. DOI*, 26 F.3d at 1103.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* One commentator stated that the FWS had "stacked a supposedly independent scientific review with advocates of listing." *Fish & Wildlife Killers*, THE WASHINGTON TIMES, June 18, 1995 at B2.

<sup>188</sup> *Id.*

<sup>189</sup> *Alabama v. DOI*, 26 F.3d at 1103.

<sup>190</sup> *See id.* One estimate held the loss at eleven billion dollars and 20,000 jobs over ten years. *Fish & Wildlife Killers*, THE WASHINGTON TIMES, June 18, 1995 at B2.

<sup>191</sup> *Alabama v. DOI*, 26 F.3d at 1105.

<sup>192</sup> *Id.* Specifically, defendant conceded that the panel was not formed under a charter as required by FACA, that it did not provide fair notice of its meetings nor did it open those meetings to the public, it kept no minutes of meetings, no federal officers or agents were present, and there was no attempt to insure that membership of the panel was fairly balanced. *Alabama-Tombigbee Rivers Coalition v. Fish & Wildlife Serv. of the United States Dep't of Interior*, 1993 U.S. Dist. LEXIS 20322, \*3 (N.D. Ala. 1993) [hereinafter *Alabama v. FWS*].

<sup>193</sup> *Id.* at \*4.

FWS immediately issued a press release stating that the scientists' findings supported listing the Alabama Sturgeon as an endangered species.<sup>194</sup> The United States District Court for the Northern District of Alabama held for the plaintiff Coalition. The court rejected the FWS argument that the plaintiff had no remedy for the admitted FACA violations and that FACA's procedural requirements are unenforceable.<sup>195</sup> The court reasoned that the defendant's restrictive reading of FACA would render the statute a "toothless tiger when used in developing a record under the Endangered Species Act."<sup>196</sup> The court also stated that:

[the] effect this injunction [would] have on the [endangered species] listing process cannot stand in the way of granting the only relief this court can conceive of for admitted FACA violations. A simple 'excuse us' cannot be sufficient. It would make FACA meaningless, something Congress certainly did not intend. FACA was designed by Congress to prevent the use of any advisory committee as part of the process of making important federal agency decisions unless that committee is properly constituted and produces its report in compliance with the procedural requirements of FACA, particularly where, as in this case, the procedural shortcomings are significant and the report potentially influential on the outcome.<sup>197</sup>

Accordingly, the court granted the Coalition an injunction. The FWS was permanently enjoined from publishing, employing, or relying either directly or indirectly on the advisory panel's report for any purpose in deciding whether or not to list the Alabama Sturgeon as an endangered species.<sup>198</sup>

The District Court's interpretation of FACA and its grant of injunctive relief were subsequently upheld on appeal by the United States Court of Appeals for the Eleventh Circuit.<sup>199</sup> The Eleventh Circuit explained that there is no authority prohibiting injunctive relief for a FACA violation.<sup>200</sup> After reviewing FACA, the court concluded that

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Alabama v. FWS*, 1993 U.S. Dist. LEXIS 20322 at \*4-5.

<sup>198</sup> *Id.* at \*6. The final outcome of the listing process was that the DOI's own scientists decided that the Alabama Sturgeon is identical to the Mississippi Sturgeon. Consequently, the Secretary of the Interior declined to list the fish as endangered or its habitat as critical. *Fish & Wildlife Killers*, THE WASHINGTON TIMES, June 18, 1995 at B2.

<sup>199</sup> *Alabama v. DOI*, 26 F.3d at 1106-07.

<sup>200</sup> *Id.* at 1106.

such a remedy was indeed available and was a legitimate way to ensure compliance with FACA.<sup>201</sup>

The Eleventh Circuit also addressed opinions from several other jurisdictions that had denied injunctive relief for FACA violations.<sup>202</sup> The court maintained that none of those jurisdictions had held that injunctive relief was a categorically unavailable remedy for a FACA violation.<sup>203</sup> Rather, in those cases, the court concluded injunctive relief had simply been an inappropriate remedy based on the facts.<sup>204</sup> The court distinguished the facts of *Alabama-Tombigbee* from cases where injunctive relief had been denied. For example, the injunctive remedy in *Alabama-Tombigbee* was prospective rather than retroactive, as it would have been in *Seattle Audubon Society v. Lyons* and *American Petroleum Institute v. Costle*. The plaintiffs in those cases had sought an injunction before the regulations, based on faulty advisory committee procedure, could be enacted.<sup>205</sup> In addition, the court stated that the fact that other courts had considered granting injunctive relief reinforced the view that, under proper circumstances, an injunction was indeed an appropriate remedy for FACA violations.<sup>206</sup> The court found that the facts of *Alabama-Tombigbee* were appropriate for injunctive relief.<sup>207</sup> The court stated that within FACA, Congress had clearly outlined the procedures required of an advisory committee, and that allowing the government to use the product of a "tainted procedure" would circumvent the policy behind FACA.<sup>208</sup> According to the court, Congress had legislated advisory committee mandates and it was a judicial responsibility to see that those mandates were carried out.<sup>209</sup> The court reasoned that issuing injunctive relief was the only way to insure future compliance with the law.<sup>210</sup>

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<sup>201</sup> *Id.* at 1106-07.

<sup>202</sup> *Id.* at 1106.

<sup>203</sup> *Id.*

<sup>204</sup> *Alabama v. DOI*, 26 F.3d at 1106.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1106-07.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1107.

<sup>209</sup> *Alabama v. DOI*, 26 F.3d at 1107.

<sup>210</sup> *Id.*

#### IV. THE MAJORITY INTERPRETATION AND APPLICATION OF FACA PREVENT FACA FROM FULFILLING ITS LEGISLATIVE INTENT

When Congress passed FACA in 1972, Congress did so with the intention and with the assumption that FACA would put an end to duplicative and wasteful executive advisory committees and open committee procedures to public scrutiny.<sup>211</sup> Congress's purpose was two-fold—to save revenue by cutting down on the number of committees—and to counteract industrial domination of advisory committees by insuring that the public would be apprised of committee activities and have a chance to voice concerns by participating in committee meetings.<sup>212</sup> Open-door advisory committee meetings were to become the norm rather than the exception.<sup>213</sup> Unfortunately, due to both unclear statutory language and a flawed judicial interpretation of FACA, neither of the goals Congress expected to achieve in passing FACA have been met.

At a cost of almost \$144 million a year, funds for advisory committees still make up a substantial part of the federal budget.<sup>214</sup> This staggering cost occasionally encourages presidential or congressional attempts at piecemeal elimination of useless advisory committees.<sup>215</sup> Yet, if FACA operated as Congress had originally anticipated, instead of the President or Congress eliminating advisory committees one at a time through individual legislation, unnecessary committees would not be formed in the first place.<sup>216</sup> Likewise, in the event that a committee had outlived its usefulness, under FACA the committee would automatically terminate after two years.<sup>217</sup>

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<sup>211</sup> See Markham, *supra* note 22, at 557.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*; see also FACA 5 U.S.C. app. § 10.

<sup>214</sup> Brown, *supra* note 10, at A23. The Department of Health and Human Services itself had 315 advisory committees in 1993 at a cost to the government of \$59 million. *Id.*

<sup>215</sup> *Id.* President Clinton has eliminated several committees by Executive Order. In addition, another thirty-one committees are currently marked for elimination by the Office of Management and Budget. *Id.*

<sup>216</sup> See FACA, 5 U.S.C. app. § 2(b)(2) which states that "new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary."

<sup>217</sup> See *id.* § 14(a)(1) which states that "[e]ach advisory committee . . . shall terminate not later than the expiration of the two year period following [its establishment] unless" it fits one of the exceptions which follow.

In addition to FACA's failure to save federal revenue, FACA has also failed to fulfill Congress's goal of opening all advisory committee meetings to the public. Closed-door advisory committee meetings still prevail, despite FACA's mandates that meetings be open to public participation.<sup>218</sup> The GSA, which monitors advisory committee activity throughout the government, reported that, in fiscal year 1993, there were more closed and partially closed advisory committee meetings (2,225) than open meetings (2,162).<sup>219</sup> It is clear from these statistics that a substantial amount of advisory committee work is still done in private, away from the public scrutiny and participation that would help limit the influence private interest groups have on the agencies they are advising.

#### *A. Problems With FACA's Language and Recommended Solutions*

The reasons for FACA's ineffectiveness are based in part on the statute itself, in part on courts' flawed definition of an advisory committee, and in part on courts' failure to award plaintiffs injunctive relief in suits based on FACA violations. The biggest deficiency of FACA is that it provides no guidance to either courts or the GSA for enforcing FACA's mandates. Although FACA requires agency compliance, there is no directive for punitive action following a FACA violation and no explicit provision for judicial enforcement. Nor does FACA provide any guidance regarding remedies courts should award in suits for FACA violations.

FACA's lack of a clear enforcement mechanism has resulted in many agencies, in turn, not requiring their advisory committees to comply with FACA. Under the current statutory scheme, there is no incentive for agencies to comply with FACA and no deterrence to noncompliance. FACA should be amended to provide for the imposition of fines against agencies which do not require their advisory committees to comply with FACA. In addition to fines, FACA should be amended such that in the case of repeated FACA violations, a delinquent agency would be denied the privilege of utilizing advisory committees for a specific period of time following the violations.

In addition, FACA's language should require courts to enjoin executive agencies and the President from promulgating legislation or regulations based on advisory committee advice rendered by a com-

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<sup>218</sup> See Brown, *supra* note 10, at A23.

<sup>219</sup> *Id.*

mittee in violation of FACA. This combination of fines and retroactive injunctions would warn executive agencies that FACA compliance is not an option they can choose to ignore with little or no recourse. Rather, it is a requirement that is in the agencies' best interest with which to comply.

Commentators have also suggested that FACA's definition of an advisory committee subject to its mandates should be clarified.<sup>220</sup> A literal reading of FACA's definition of an advisory committee leads to the conclusion that any group of two or more people, either established or utilized by an executive agency or the President for the purpose of providing advice, must be in compliance with FACA.<sup>221</sup> Critics of FACA and courts interpreting FACA have found this definition troubling out of fear that applying FACA to all such groups will stifle every-day conversation that normally occurs throughout the government.<sup>222</sup> This fear has led courts to overcompensate for what they see as an overreaching, overinclusive statute.<sup>223</sup> In an attempt to restrict FACA's overinclusive language, courts have limited the judicial definition of an advisory committee far beyond what Congress ever intended.<sup>224</sup> Courts' fear that a literal interpretation of FACA's definition of an advisory committee would stifle communication and impede governmental decisionmaking is not wholly unfounded. Yet, it was not such informal conversations that Congress was seeking to prevent.<sup>225</sup> Rather, Congress passed FACA to insure that, when a group of expert professionals meet to provide advice on governmental policy, they alone are not given an unfair opportunity to influence that policy.<sup>226</sup> Courts' fears would be eliminated if FACA's definitional section were changed to state that FACA is not expected to apply to the informal, ad hoc conversations that constantly occur between political officers and that provide for effective and fluid governmental communications. FACA should be clarified to apply only when an organized group of experts and professionals meet to discuss a preconceived agenda whose end result is expected to indirectly or directly influence governmental policymaking.

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<sup>220</sup> See Gage & Epstein, *supra* note 17, at 50011.

<sup>221</sup> See *supra* notes 110–14 and accompanying text.

<sup>222</sup> See *supra* notes 115–17 and accompanying text.

<sup>223</sup> See, e.g., *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 440 (1989); *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009, 1009 (D.D.C. 1994).

<sup>224</sup> *Espy*, 846 F. Supp. at 1009.

<sup>225</sup> See, Markham, *supra* note 22, at 557; see also *Steck testimony*, *supra* note 17, at 347.

<sup>226</sup> See *supra* notes 88–90 and accompanying text.

### B. *Problems With the Current Judicial Interpretation of FACA*

In the event that the above proposed amendments to FACA do not occur, or until they occur, it is up to courts to construe FACA to fulfill the goals Congress hoped to achieve in passing FACA. The only ways to fulfill the legislative intent behind FACA are for courts to amend the current judicial definition of an advisory committee and for courts to provide injunctive relief to plaintiffs suing for FACA violations.

As discussed above, courts have found the statutory definition of an advisory committee to be overinclusive and stifling to normal governmental process.<sup>227</sup> As a result, courts have attempted to limit the definition of an advisory committee and have applied FACA only when, in their view, the evils FACA was expected to cure are in danger of occurring.<sup>228</sup> It may be true that the advisory committee abuses Congress was seeking to prevent when it passed FACA are not in danger of occurring in limited circumstances like those in *Public Citizen v. United States Department of Justice*.<sup>229</sup> However, this strict, subjective definition of an advisory committee will continue to exempt groups which should clearly be subject to FACA, simply because a court finds no danger of abuse. The Court in *Public Citizen* should not have searched FACA for explicit congressional intent to include the ABA Committee within the definition of an advisory committee. The language of FACA itself states that FACA applies to all groups which are either established or utilized by an executive agency or the President.<sup>230</sup> In addition, FACA specifically excludes those groups to which Congress did not intend FACA to apply.<sup>231</sup> *Public Citizen* is an example of the Court broadly denying congressional intent simply out of a desire to limit application of a statute on a particular set of facts. The Court in *Public Citizen* was hesitant to apply FACA's requirements to the ABA Committee.<sup>232</sup> The Court's primary concern appeared to be a fear that judicial intrusion into the

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<sup>227</sup> See *supra* notes 115-17 and accompanying text.

<sup>228</sup> See *supra* notes 121-24 and accompanying text.

<sup>229</sup> *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 443-44 (1989).

<sup>230</sup> FACA, 5 U.S.C. app. § 3(2).

<sup>231</sup> *Id.* § 4. In May, 1995, President Clinton signed the so-called "Unfunded Mandates Law." Part of the law amends FACA and creates an exemption which allows consultations with affected state, local, and tribal governmental officials to be conducted in private. David Hosansky, *Provisions: Unfunded Mandates Law*, CONGRESSIONAL QUARTERLY WEEKLY REPORT, May 10, 1995 at 1087-88.

<sup>232</sup> *Public Citizen*, 491 U.S. at 443-45.

President's ability to solicit advice about judicial nominees would frustrate the President's constitutional power of appointment.<sup>233</sup> Instead of broadly limiting FACA's clear and unambiguous definition of an advisory committee, the Court either should have deferred to the legislature to amend FACA to specifically exclude the ABA Committee, or limited the case to its facts.<sup>234</sup> Instead, the result of *Public Citizen*—selective enforcement of FACA—frustrates the legislative intent behind its passage. Instead of applying FACA to any group not specifically exempted by statute, which is either established or utilized by an executive agency or the President, the Court has created a vague and ambiguous result. FACA now only applies when there is a subjective danger of advisory committee abuse.<sup>235</sup> This is an unclear and unworkable definition which gives no guidance to executive agencies as to which advisory groups must be established and conducted in compliance with FACA.

In addition to following FACA's objective definition of an advisory committee, courts should follow the lead of the Eleventh Circuit and provide injunctive relief for plaintiffs bringing suit for FACA violations. As discussed above, the court in *Alabama-Tombigbee Rivers Coalition v. United States Department of Interior* enjoined the FWS from relying on or utilizing an advisory committee report compiled amidst FACA violations.<sup>236</sup>

Critics of the *Alabama-Tombigbee* decision may argue that the court rendered a waste all the work the scientific advisory committee in *Alabama-Tombigbee* had done. Critics may also suggest that the *Alabama-Tombigbee* court should have first determined whether the report would have been any different had FACA been complied with fully, and if not, treat the case as one of harmless error, as the court in *Seattle Audubon Society v. Lyons* did.<sup>237</sup> Yet, the *Alabama-Tombigbee* court found that Congress had passed FACA to prevent the

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<sup>233</sup> *Id.* at 443, 467.

<sup>234</sup> *Id.* at 440. In *Public Citizen*, the Court discusses a previous Supreme Court decision, *United States v. Locke*, 471 U.S. 844, 896 (1985), quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933), which states that "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *Public Citizen*, 491 U.S. at 467. Yet, this is exactly what the Court chose to do. *See id.* As the opinion stated, "[o]ur unwillingness to resolve important constitutional questions unnecessarily thus solidifies our conviction that FACA is inapplicable." *Id.*

<sup>235</sup> *See id.* at 440.

<sup>236</sup> *Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103, 1105-07 (11th Cir. 1994).

<sup>237</sup> *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1310 (W.D. Wash. 1994).



use of any advisory committee as part of the process of making important federal agency decisions unless that committee is properly established and in compliance with proper procedure.<sup>238</sup> The court stated that whether or not the panel's report would have been different had the committee complied with FACA, was irrelevant.<sup>239</sup> The court noted that "[e]ven if the panel was scrupulously formed and composed of the most fair and impartial scientists around, its meetings and issuance of its report would still run afoul of FACA."<sup>240</sup> The court accordingly held that since the advisory committee had violated FACA, the agency to which the committee reported could not rely on the report the committee generated.<sup>241</sup>

The Eleventh Circuit's application and enforcement of FACA will have a deterrent effect on agencies operating within its jurisdiction. If an agency wishes to utilize or rely on any advice rendered by an advisory committee, the agency must ensure that the advisory committee complies with FACA or the agency may subsequently be enjoined from utilizing any advice the committee provides.

Although in *Alabama-Tombigbee* the plaintiff was actually a group of businesses rather than an environmental protection group,<sup>242</sup> the Eleventh Circuit's injunctive remedy will protect both the public and the environment from influential private industry involved in the committee process.<sup>243</sup> By encouraging agency compliance with FACA, the Eleventh Circuit is insuring that agencies will insist that their advisory committees open their meetings to the public. If the agency utilizing the advisory committee is exposed to opposing viewpoints in advisory committee reports, there is little doubt that industry domination will decrease substantially and a pro-environmental viewpoint will be heard.

## V. CONCLUSION

The current statutory construction of FACA and its judicial interpretation have left FACA ineffective at carrying out the goals Congress had anticipated FACA would achieve. Amending FACA and

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<sup>238</sup> *Alabama v. DOI*, 26 F.3d at 1106.

<sup>239</sup> *See id.* at 1106-07.

<sup>240</sup> *Alabama-Tombigbee Rivers Coalition v. Fish & Wildlife Serv. of the United States Dep't of Interior*, 1993 U.S. Dist. LEXIS 20322 at \*3 (N.D. Ala. 1993).

<sup>241</sup> *See Alabama v. DOI*, 26 F.3d at 1107.

<sup>242</sup> *Id.* at 1104.

<sup>243</sup> Carson, *supra* notes 1-9 and accompanying text.

adopting the Eleventh Circuit practice of ordering injunctive relief in suits for FACA violations would cure this deficiency.

Under the current scheme, there is no incentive for executive agencies, the President, or advisory committees to comply with FACA's mandates. FACA was proposed and passed to prevent the evils that had been occurring under the weaker, more vague advisory committee requirements of President Kennedy's Executive Order. Extensive testimony throughout the congressional hearings which led to FACA's passage confirmed the need for legislative control of advisory committees to ensure that committees were serving the public interest and not promoting selfish private agendas. Under the current judicial interpretation of FACA, however, numerous groups which should be subject to FACA are excluded and no remedy is available for plaintiffs complaining of FACA violations. The current judicial interpretation of FACA is not functioning as Congress had intended it to.

In order for FACA to function as an effective control over advisory committee procedures, Congress must amend FACA to clarify its ambiguities. Until that occurs, or in the event that Congress does not act, courts must broaden their definition of an advisory committee and make FACA applicable to any group which fits the current objective legislative definition of an advisory committee. Courts should also follow the lead of the Eleventh Circuit and enjoin executive agencies and the President from utilizing or relying on any advice or report compiled by a committee in violation of FACA. If courts adopted these changes in FACA's interpretation and application, courts would achieve Congress's intent in passing FACA. In addition, FACA would be a successful way to ensure that an environmental viewpoint is brought forth whenever the executive branch utilizes advisory committees in the adoption of new governmental policy.